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Current Constitutional Issues in Canada

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Current Constitutional Issues in Canada

*Honourable Justice John M. Evans**

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I. INTRODUCTION

I wish first to thank the organizers for putting on this splendid international event. We all benefit from the experience of other jurisdictions in addressing issues similar to those we deal with at home. I am therefore very grateful to Professor Barker for graciously inviting me to participate. As the Canadian correspondent, I am conscious of treading in the large footprints left by the former Chief Justice of our Court, the Honourable John Richard, who so ably represented Canada at four of these seminars.

My presentation has four parts. First, a brief introduction to review the principal features of Canada's constitution in order to provide context to the issues raised subsequently. The next section describes two current issues of federalism: national unity and a national regulatory regime for the securities industry. My next

* Justice, Federal Court of Appeal, Ottawa, Canada. Justice Evans acknowledges that his paper greatly benefited from the meticulous research and keen editorial eye of Laura Dougan, his current law clerk, to whom he is most grateful. This paper constitutes speaking notes that were prepared for a presentation at the Current Constitutional Issues in the Americas seminar held at Duquesne University School of Law, Pittsburgh, from November 9, 2012 to November 10, 2012.

section concerns the constitutional protections afforded by the Canadian Charter of Rights and Freedoms to Canadian citizens who are outside Canada and wish to return, and to non-citizens detained in Canada who have not been charged with the commission of a crime in Canada but who are believed to pose a threat to national security. The final section examines the development of a constitutional right of Aboriginal peoples to be consulted before governmental action is taken that may adversely affect a substantive Aboriginal right.

Finally, I should add that my position as a sitting appellate court judge inevitably constrains my ability to offer my own views on how any of the contested legal issues discussed in this paper should be resolved, or to suggest that apparently settled questions have been wrongly decided and should be reopened. Nonetheless, I shall do my best to avoid merely serving up a dry catalogue of the recent constitutional doings of our courts.

II. CANADA'S CONSTITUTION: A BIRD'S EYE VIEW

I have identified the following features of Canada's constitution that may provide some useful context to what follows.

First, the preamble to the Constitution Act, 1867, Canada's founding constitutional document, states that the constitution of the new confederation is "similar in Principle to that of the United Kingdom."¹ Thus, Canada is a constitutional monarchy. The Queen is the head of state, but her powers are exercised in Canada by the Governor-General. By constitutional convention, the Crown's powers are normally only exercised in accordance with the advice of Government Ministers. By convention, Ministers are members of the House of Commons or Senate and are responsible to Parliament for the actions of the Executive. The Government is formed by the political party that can command a majority in the House of Commons. Canada is also a parliamentary democracy in which Parliament enjoys legislative supremacy, although a Government with an absolute majority in the House of Commons, reinforced by strict party discipline, is generally able to ensure that the measures that it introduces are enacted. To a large extent, the constitutional relationship between Legislative and Executive

1. Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.), reprinted in R.S.C. 1985, app II, no. 5 (Can.).

branches of Government in Canada is, like the United Kingdom, the subject of unwritten law and constitutional conventions.

Second, unlike the doctrine of parliamentary sovereignty in the United Kingdom, the supremacy of the legislative branch in Canada is subject to the provisions of the formal constitution contained in the Constitution Acts, 1867-1982.² It is the function of the judiciary, whose independence of the other two branches of government is guaranteed by sections 96 to 100 of the Constitution Act of 1867 and by an unwritten principle of the Constitution, to determine whether impugned legislation contravenes the constitution, the supreme law of the land, and, if it does, to provide an appropriate remedy, including a declaration that the law is invalid and of no force or effect.³

Third, Canada is a federation in which the legislative powers of the Parliament of Canada on the one hand, and the legislatures of the provinces on the other, are listed in the Constitution Act of 1867.⁴ Constitutional historians generally agree that the drafters of the Constitution intended to create a strong central government, vesting in the Parliament of Canada legislative competence over, for example, the criminal law, the regulation of trade and commerce, and a residual power to legislate for the peace, order, and good government of Canada.⁵ Furthermore, in the event of a conflict between federal and provincial laws, the federal law prevails.

However, from the earliest days when the Judicial Committee of the Privy Council in London was the ultimate court of appeal from the courts of the colonies, the courts, for the most part, have not shared this centralist view of the constitution. In particular, they have read the trade and commerce power narrowly,⁶ and given a

2. *Id.*; Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.).

3. *N. Telecom Can. Ltd. v. Comm'n Workers of Can.*, [1983] 1 S.C.R. 733, 741 (Can.); *Remuneration of Judges of the Provincial Court of P.E.I.*, [1997] S.C.R. 3, paras. 123-24 (Can.).

4. Constitution Act, 1867, §§ 91-92 (Can.).

5. PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA (5th ed. 2007).

6. The leading case on the interpretation of the trade and commerce power under s 91(2) of the Constitution Act, 1867 is *Citizens Ins. Co. of Can. v. Parsons*, [1881] 4 S.C.R. 215, 7 (Can.). The approach in *Parsons* was affirmed in later cases such as: *MacDonald v. Vapor Can. Ltd.*, [1977] 2 S.C.R. 134 (Can.); *Canada (Att'y Gen.) v. Can. Nat'l Transp., Ltd.*, [1983] 2 S.C.R. 206; *Gen. Motors of Can. Ltd. v. City Nat'l Leasing*, [1989] 1 S.C.R. 641 (Can.) (which set out the test for what falls within the general branch of the trade and commerce power); *Kirkbi AG v. Ritvik Holdings Inc.*, [2005] 3 S.C.R. 302 (Can.). For further description of the development of this power, see *Reference re Securities Act*, [2011] 3 S.C.R. 837, paras. 68-85 (Can.).

broad interpretation to the exclusive power of provincial legislatures over property and civil rights in the Province, as well as over matters of a merely local or private nature.⁷

Our courts have rejected an "originalist" approach to constitutional interpretation. Instead, the Constitution is to be regarded as a "living tree" and interpreted progressively in light of technological and scientific advances, changing social and economic conditions, and new ideas.⁸ The Supreme Court of Canada currently favours an approach to constitutional interpretation that reflects a cooperative, flexible model of federalism that accommodates overlapping jurisdictions and supports intergovernmental efforts.⁹ However, as the Court has also recently reminded us, a flexible interpretative approach does not warrant reading the Constitution in a manner that lacks "respect for the constitutional division of powers and the maintenance of a constitutional balance between federal and provincial powers."¹⁰

Fourth, in 1982 Canada added the Canadian Charter of Rights and Freedoms to its Constitution,¹¹ which gave constitutional protection to the individual rights that it describes. Provincial or federal legislation, or administrative action, that infringes upon any of these rights is of no force or effect. However, section 1 of the Charter provides that these rights are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."¹² Moreover, as a compromise between the traditional doctrine of parliamentary supremacy and constitutionally entrenched rights, the Charter enables Parliament and provincial legislatures to enact legislation that expressly overrides most Charter-protected rights.¹³

7. See *Canada (Att'y Gen.) v. Ontario (Att'y Gen.)*, [1937] AC 326, 354 (in which Lord Atkin stated that the powers set out in sections 91 and 92 of the Constitution Act, 1867 should be viewed as "watertight compartments."). For general discussion of the development of the provincial powers over property and civil rights and matters of a local and private nature, see HOGG, *supra* note 5, at ch. 21.

8. *Edwards v. Canada (Att'y Gen.)*, [1930] AC 124, 136; *Reference re Employment Insurance Act*, [2005] 2 S.C.R. 669, para. 9; *Securities Act*, para. 56.

9. See, e.g., *Fédération des producteurs de volailles du Que. v. Pelland*, [2005] 1 S.C.R. 292, para. 15 (Can.); *Can. W. Bank v. Alberta*, [2007] 2 SCR 3, para. 24 (Can.); *Reference re Securities Act*, [2011] 3 S.C.R. 837, para. 57 (Can.).

10. *Reference re Securities Act*, 3 S.C.R. 837, para. 61.

11. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.).

12. *Id.* § 1.

13. *Id.* § 33.

Fifth, the Constitution Act, 1982 recognizes and affirms existing aboriginal and treaty rights of the Aboriginal peoples of Canada, who include the Indian, Métis, and Inuit peoples of Canada.¹⁴ Much remains to be done to improve the sorry economic and social plight of too many of Canada's first peoples.

Sixth, the Constitution Act, 1982 removes the last legal vestiges of Canada's history as a colony of the United Kingdom by "patriating" the Constitution. That is, it enables constitutional amendments to be made in Canada, in accordance with a complex amending formula, without reference to the Parliament of the United Kingdom.¹⁵

III. TWO CURRENT FEDERALISM ISSUES

A. *The National Unity Question: Breaking Up Is Hard (But Not Impossible) to Do*

The existential question of the place of the Province of Québec, within or without the Canadian Confederation, is always with us. The distinctiveness of Québec derives from the fact that it is largely French speaking, and has a strong cultural identity, as well as history and political and social traditions, not shared with the rest of Canada. In an acknowledgment of these characteristics, the federal Parliament recently passed a resolution recognizing the Québécois as a nation ("*une nation*") within Canada.¹⁶ Over the years, the urgency of the possible separation of Québec from the Confederation has ebbed and flowed.

After the narrow defeat in 1995 of a referendum initiated by a provincial government formed by the separatist Parti Québécois ("PQ"), and anticipating that another referendum could be held, the Government of Canada requested an advisory opinion from the Supreme Court of Canada on the constitutional validity of the unilateral secession of a province from the Confederation.¹⁷

In a statesmanlike opinion, the Court held that neither the Canadian Constitution nor international law permits unilateral secession.¹⁸ However, it also acknowledged that if the government of

14. *Id.* §§ 25, 35.

15. *Id.* § 38.

16. Parliament, *Votes and Proceedings*, 39th Parl., 1st Sess, No 72 (November, 27 2006) (Can.).

17. Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.).

18. *Id.* at para. 155.

a seceding province established control over its territory and was recognized by the international community, the Canadian Constitution would eventually have to come to terms with the reality that the province had indeed become an independent state and had ceased to be part of Canada.¹⁹ More interestingly, the Court also went on to infer from the underlying constitutional principles of the rule of law and from federalism that a clear majority in a provincial referendum for secession on a clear question would compel the Government of Canada and the other provinces to negotiate in good faith with the dissident province to amend the Constitution to respond to the democratically expressed desire of the electorate to secede.²⁰

In 2000, Parliament sought specificity with respect to the conditions triggering constitutional negotiations, which the Supreme Court of Canada had stated should be decided by politicians, not the courts: namely, whether the question on which the electorate had voted was "clear" and whether there was a "clear majority" for secession.²¹ Section 1 of the Clarity Act provides that to be "clear," the question put to the electorate must result in the "clear expression of the will of the population of a province on whether the province should cease to be part of Canada and become an independent state."²² A question designed merely to give a provincial government a mandate to negotiate independence, or a question that proposes merely different economic and political arrangements with Canada without specifying secession, would not be "clear" for this purpose.²³

If the House of Commons determines that the question put to the electorate was "clear" and a majority of the votes cast were in favour of secession, section 2 of the Clarity Act requires the House of Commons to consider if the majority was "clear."²⁴ However, instead of specifying a precise minimum percentage of the votes needed for a "clear" majority, the Act directs the House to determine whether the majority is "clear" by taking into account the size of the majority, the percentage of eligible voters who cast a vote and "any other matters or circumstances it considers to be

19. *Id.* at para. 106.

20. *Id.* at paras. 88-92.

21. Clarity Act, S.C. 2000, c. 26, § 1 (Can.).

22. *Id.* § 1(3).

23. *Id.* § 1(4)(a)(b).

24. *Id.* § 2(1).

relevant.”²⁵ Without a clear majority on a clear question, subsection 1(6) of the Clarity Act forbids the Government of Canada from entering into secession negotiations with a province.²⁶

Concerns about the possibility of secession have recently returned to the Canadian scene. In September, 2012, the PQ was elected to form the Government of Québec. The PQ Government is pledged to hold a third referendum on secession at some time and in some circumstances, as yet to be defined. Paradoxically, popular support for secession seems to be currently running at significantly less than the 40% of recent historical levels.²⁷ Moreover, the PQ is four seats short of an overall majority in the provincial legislature, L'Assemblée Nationale, which means that the opposition parties can combine to defeat the Government on major issues with which they disagree, including the holding of a secession referendum.

For these two reasons, it is unlikely that we shall be forced at any time soon to figure out the precise scope of the duty imposed by the Supreme Court on the parties to the Confederation to negotiate in good faith following a referendum in which a clear majority voted for secession on a clear question. However, demands by the Government of Québec for the transfer of powers to it may pose some political problems for the federal Government in fashioning an appropriate response.

B. The Regulation of the Securities Industry: Still Not a Matter of National Concern

A less fundamental but nonetheless important and long-standing issue of Canadian federalism concerns the power of the federal Parliament to create a national scheme to regulate the issuing and trading of securities to supersede the current arrangements under which each province operates its own regime for regulating the securities industry within its boundaries. Provin-

25. *Id.* § 2(2).

26. *Id.* § 1(6).

27. Jeffrey Simpson, *Do we care if another tussle for Quebec sovereignty happens now?*, THE GLOBE AND MAIL (Sept. 1, 2012), <http://www.theglobeandmail.com/news/politics/elections/do-we-care-if-another-tussle-for-quebec-sovereignty-happens-now/article4513853/> (citing a recent CROP survey putting support for sovereignty at 28%); *PQ's election chance raises referendum questions*, THE CANADIAN PRESS (Sept. 3, 2012), <http://www.cbc.ca/news/canada/quebecvotes2012/story/2012/09/03/parti-quebecois-referendum.html>.

cial securities legislation is enacted pursuant to the provinces' legislative power over property and civil rights in the Province, and matters of a merely local or private nature in the Province.²⁸

Ontario is the most important capital market in Canada, especially for large corporations in the financial services and mining sectors. It is the home of Canada's biggest stock market, the Toronto Stock Exchange, and of the senior provincial securities regulatory agency, the Ontario Securities Commission. Québec is also a significant financial centre, especially for technology listings: the Montréal Stock Exchange is also an important market for bonds and derivatives. Capital for smaller mining and energy ventures, which tend to be somewhat speculative in nature, is mainly raised in the provinces of Alberta and British Columbia, which set the rules applicable to the issue of shares and other securities within their jurisdiction. Despite these regional specializations, most issuers raise capital and report in more than one jurisdiction, and most large companies raise capital nationally.

Proponents of legislative reform argue that a single national securities regulator would make for a more efficient capital market in which issuers of securities would have to comply with only one set of regulatory rules. Such a scheme, it is said, would also provide more effective consumer protection for investors. The need to replace the present "patchwork" arrangements is argued to be particularly pressing because of the emergence of an integrated capital market, both nationally and internationally, and of ever larger and more sophisticated schemes designed to defraud investors.²⁹

After many reports on the subject by different individuals and organizations over a period of more than forty years, in 2011 the Government published draft legislation establishing a national securities regulatory scheme administered by a single regulator. It referred the proposed measure, the Securities Act,³⁰ to the Su-

28. Reference re Securities Act, [2011] 3 S.C.R. 837, para. 126 (Can.). For examples of provincial legislation, see: Securities Act, R.S.Y. 2007, c. 16 (Can. Yukon); Securities Act, R.S.B.C. 1996, c. 418 (Can. B.C.); Securities Act, R.S.N.L. 1990, c. S-13 (Can. Nfld.); Securities Act, R.S.A. 2000, c. S-4 (Can. Alta.); Securities Act, S.Nu 2008, c. 12 (Can. Nun.); Securities Act, R.S.N.S. 1989, c. 418 (Can. N.S.); Securities Act, R.S.P.E.I. 1988, c. S-3.1 (Can. P.E.I.); Securities Act, R.S.N.W.T. 2008, c. 10 (Can. N.W.T.); Securities Act, R.S.O. 1990, c. S.5 (Can. Ont.); Securities Act, R.S.N.B. 2004, c. S-5.5 (Can. N.B.); Securities Act, R.S.S. 1988-89, c. S-42.2 (Can. Sask.); Securities Act, C.C.S.M. c. S-50 (Can. Man.).

29. See generally Thomas Hockin et al., *Expert Panel on Securities Regulation Final Report and Recommendations*, OTTAWA: DEPT OF FIN. (2009) (Can.).

30. In 2009, the Government of Canada created the Canadian Securities Transition Office ("CSTO") to manage the transition to national securities regulation. Although the

preme Court of Canada for an advisory opinion on its constitutional validity.³¹ The Government relied on federal competence over the regulation of trade and commerce to support the Act.

Read literally, Parliament's power to regulate trade and commerce could, through the doctrine that federal laws prevail over conflicting provincial laws, effectively displace the provinces' power to regulate economic activity within their boundaries as matters of property and civil rights, or of a merely local or private nature.³² In fact, the commerce clause has been interpreted by the courts as having two components: first, interprovincial and international trade and commerce, and second, matters relating to trade and commerce that are genuinely national in scope.³³ The latter is known as the "general branch" of the commerce clause and was the one on which the Government built its case for the validity of the Securities Act.³⁴

It was conceded that some aspects of securities trading are inter-provincial in scope, and thus potentially subject to federal regulation. However, this was not the basis on which the Government of Canada chose to proceed, and the Court did not comment on the extent to which Parliament could rely on the inter-provincial branch of the trade and commerce power to design a national scheme to regulate the securities market.³⁵ Since the *Securities Act* was designed to create a comprehensive scheme, it stood or fell as a whole.³⁶

To the surprise, not to say consternation, of many constitutional commentators (but by no means all), the Court unanimously held the proposed *Securities Act* to be invalid as beyond the legislative

proposed Securities Act discussed by the Supreme Court was never introduced into Parliament, a draft of the legislation was developed by the Department of Finance and was published on the website of the CSTO. See *Proposed Canadian Securities Act*, DEPARTMENT OF FIN. (May 25, 2005), <http://www.fin.gc.ca/drleg-apl/csa-lvm.pdf>.

31. Reference re Securities Act, [2011] 3 S.C.R. 837, paras. 11-28 (Can.). Prior to the Supreme Court reference, both the Alberta Court of Appeal and the Quebec Court of Appeal had concluded that the proposed Act was unconstitutional. Reference re Securities Act, [2011] ABCA 77, 41 Alta LR (5th) 145 (Can. Alta); Québec (Procureurgénéral) c. Canada (Procureurgénéral), [2011] QCCA 591 (Can. Que.).

32. Reference re Securities Act, 3 S.C.R. 837 at para. 72.

33. *Id.* at paras. 46, 75; see also *Citizens Ins. Co. of Can. v. Parsons*, [1881] 4 S.C.R. 215, 300 (Can.).

34. Reference re Securities Act, 3 S.C.R. 837 at paras. 5-6, 32.

35. *Id.* at para. 129; see also Jeremy Fraiberg, *National Securities Regulator: The Road Ahead*, 52 CAN. BUS. L.J. 174 (2012) for further discussion on the other options available to the government for proceeding with a national securities regulator.

36. Reference re Securities Act, para. 91.

competence of Parliament.³⁷ The “pith and substance” of the Act’s subject matter, the Court held, concerned property and civil rights in the provinces.³⁸ It was not supportable under the general branch of the commerce clause because it was not primarily focused on matters genuinely national in scope that are qualitatively different from those falling under the provincial heads of power over property and civil rights in the province or matters of a merely local nature.³⁹

The core of the Court’s objection to the Act was the comprehensive scope of the regulatory scheme that it created, including day-to-day trading activities, the registration of brokers and other market participants, and standards of conduct for trading – all matters that are currently the subject of provincial legislation.⁴⁰ In order to fall within the general branch of the commerce clause as being “genuinely national in scope,” the Court said, a matter must be something that the provinces either individually or collectively could not effectively achieve.⁴¹ A broader reading of the commerce clause, it stated, would result in the duplication and replacement of functions already performed by the provinces, thereby upsetting the constitutional balance of powers underlying Canadian federalism.⁴² It was not for the Court to determine the optimal regulatory scheme; that was a matter of policy for politicians to work out, not law.⁴³

The Court conceded, however, that the evolution of securities markets presented challenges that can only be adequately addressed at the national level through federal legislation.⁴⁴ In its view, systemic risk management and data collection fall within the commerce clause because these are functions that the provinces could not effectively perform.⁴⁵ Nonetheless, the Court was

37. For commentary on the Supreme Court’s decision, see Fraiberg, *supra* note 35; Jeffrey MacIntosh, *Politics, Not Law*, 52 CAN. BUS. L.J. 179 (2012); Eric Spink, *Reacting to the Status Quo in Securities Regulation*, 52 CAN. BUS. L.J. 182 (2012); Stéphane Rousseau, *Endgame: The Impact of the Supreme Court’s Decision on the Project to Create a National Securities Regulator*, 52 CAN. BUS. L.J. 186 (2012); Poonam Puri, *The Supreme Court’s Securities Act Reference Fails to Demonstrate an Understanding of the Canadian Capital Markets*, 52 CAN. BUS. L.J. 190 (2012).

38. Reference re Securities Act, 3 S.C.R. 837 at paras. 116, 128.

39. *Id.* at paras. 124-25.

40. *Id.* at paras. 100-11, 106, 116, 122-23.

41. *Id.* at para. 83.

42. *Id.* at paras. 7, 101, 106.

43. *Id.* at paras. 90, 127.

44. *Id.* at para. 128.

45. *Id.* at paras. 104-05, 121, 128.

not persuaded that changes in the securities market were such as to warrant regarding all securities issuing and trading as a matter of national scope beyond the ability of the provinces to effectively regulate.⁴⁶ The inability of Parliament to regulate all aspects of the securities industry in Canada would not create a "constitutional gap."⁴⁷

In order to leave room for provincial choice, the proposed *Securities Act* would only replace a provincial scheme when the Province opted into the federal scheme; the Act thus contemplated that it would not necessarily apply in all provinces. Further, the proposed Act largely mirrors existing provincial legislation.⁴⁸ However, rather than regarding these features of the Act as appropriate nods to co-operative federalism, the Court took them to be indicators that the securities market in Canada could be effectively regulated without a comprehensive national regulatory scheme administered by a single regulator.⁴⁹

Finally, the Court emphasized that under its decision that the *Securities Act* was *ultra vires*, the general branch of Parliament's power under the trade and commerce clause did not prevent federal and provincial authorities from co-operating to produce a regulatory scheme that was both effective and respected the scope of their respective legislative powers, as had occurred in other federal jurisdictions.⁵⁰

Commentators are divided on whether it is feasible for any such agreement to be reached.⁵¹ I would not have thought that history is on the side of the optimists!

IV. CURRENT CHARTER ISSUES

The *Canadian Charter of Rights and Freedoms* very quickly became an integral part of Canada's public law following its inclusion in the Constitution in 1982. Over the last thirty years, its impact on many major social and criminal justice issues of the day has been extraordinary. Here are a few examples.

The refugee determination system was held to be invalid because it did not provide claimants with an oral hearing before the

46. *Id.* at paras. 117, 122.

47. *Id.* at para. 83.

48. *Id.* at para. 116.

49. *Id.*

50. *Id.* at paras. 130-31.

51. See Fraiberg, *supra* note 35; MacIntosh, *supra* note 37; Spink, *supra* note 37; Rousseau, *supra* note 37; Puri, *supra* note 37.

decision-maker.⁵² Criminal law restrictions on a woman's access to abortion were struck down.⁵³ Prosecutors are required to make extensive disclosure of evidence potentially relevant to an accused person's defence.⁵⁴ The legal definition of marriage that precludes marriage between same-sex couples has been held to be a denial of the right to equality.⁵⁵ The Government may only extradite a citizen to stand trial on a charge in a foreign jurisdiction where conviction carries the death penalty, if it has obtained an undertaking from the prosecuting authorities in the foreign state that, in the event of a conviction, they will not request the execution of the accused.⁵⁶ And, an appellate court recently struck down provisions that criminalized the acts of living off the avails of prostitution and operating a brothel, on the ground that their effect was to increase unjustifiably the risks of bodily harm facing sex workers.⁵⁷

While all these topics were controversial at the time, no area provides a more severe test of a state's commitment to the protection of individual liberty than action taken in the name of national security in the face of a widely shared perception that a serious threat exists to the safety and well-being of the population. The events of September 11, 2001, the subsequent bombings in London and Madrid, as well as several other potentially devastating terrorist plots, provide the essential context for the current version of the age-old challenge that has faced democracies committed to the rule of law: balancing fundamental rights against threats to national security.

52. *Singh v. Minister of Emp't and Immigration*, [1985] 1 S.C.R. 177 (Can.).

53. *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (Can.).

54. *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (Can.).

55. *Halpern v. Canada (Att'y General)* (2003), 65 O.R. 3d 161, 225 D.L.R. 4th 529 (Can. Ont.). Shortly after the decision in *Halpern*, the Government of Canada proposed legislation that would change the legal definition of marriage to include same-sex couples and asked the Supreme Court to determine its constitutionality. In *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 (Can.), the Supreme Court held that the draft legislation including same-sex couples within the definition of marriage was consistent with the Charter. In 2005, the Civil Marriage Act, S.C. 2005, c. 33 (Can.), was passed and defines marriage for civil purposes as "the lawful union of two persons." *Id.* § 2.

56. *U.S. v. Burns*, [2001] 1 S.C.R. 283 (Can.); see also *Suresh v. Canada*, [2002] 1 S.C.R. 3 (Can.) (similar decision regarding the deportation, as opposed to the extradition of non-citizens).

57. *Canada (Att'y General) v. Bedford*, [2012] O.N.C.A. 186, paras. 253-55, 325 (Can. Ont. C.A.) (leave to appeal to the Supreme Court of Canada has been requested). On a third issue of communicating for the purpose of prostitution in public, the Court, by a majority, allowed the Crown's appeal and upheld the provision on the ground that it was in accordance with the principles of fundamental justice. *Id.*

When the state impinges on constitutionally protected individual rights, the task of reviewing whether an appropriate balance has been struck ultimately falls to the courts. An important question of institutional competence and legitimacy is also at play in these cases. The Executive is responsible and politically accountable for the critical issue of public safety, and it has a unique wealth of knowledge for assessing national security risks. Given these considerations, how deferential should the courts be in reviewing the constitutionality of the limitations imposed on rights in the name of national security?

In Canada, the courts have adopted the notion that a successful constitutional challenge to the validity of legislation is not necessarily the last word on the matter but can result in a constructive "dialogue" between the Judiciary and Parliament.⁵⁸ This, it is said, promotes democratic debate and results in a solution that permits Parliament to advance important public policy objectives in a manner that is least intrusive on constitutional rights.

A. *Detention and Deportation*

Striking the right balance between the public interest in national security and constitutionally protected rights may arise in a variety of legal contexts. However, in Canada most of the high profile litigation has arisen in connection with the detention of five non-citizens under security certificates signed by two Ministers pending their removal from Canada.⁵⁹ Security certificates state

58. For Supreme Court cases endorsing the notion of "dialogue," see *Vriend v. Alberta*, [1998] 1 S.C.R. 493, paras. 138-39 (Can.), *R v. Mills*, [1999] 3 S.C.R. 668, paras. 20, 57, 125 (Can.), and *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 576, paras. 104-08. For academic discussion of "dialogue theory," see generally KENT ROACH, *THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE* (2001); Rosalind Dixon, *The Supreme Court of Canada, Charter Dialogue, and Deference*, 47 OSGOODE HALL L.J. 235 (2009); Peter W. Hogg & Allison A. Bushnell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps The Charter of Rights Isn't Such A Bad Thing After All)*, 35 OSGOODE HALL L.J. 75 (1997); Peter W. Hogg, Allison A. Bushnell Thornton & Wade K. Wright, *Charter Dialogue Revisited—Or 'Much Ado About Metaphors'*, 45 Osgoode Hall L.J. 2 (2007); Kent Roach, *Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures*, 80 CAN. BAR. REV. 481 (2001); Kent Roach, *Dialogic Judicial Review and its Critics*, 23 Sup. Ct. L. Rev. (2d) 49, 54 (2004); Kent Roach, *Constitutional, Remedial, and International Dialogues About Rights: The Canadian Experience*, 40 TEX. INT'L L.J. 537 (2005); Kent Roach, *A Dialogue About Principle and a Principled Dialogue: Justice Iacobucci's Substantive Approach to Dialogue*, 57 U. Toronto L.J. 449 (2007).

59. The five individuals subject to security certificates were Mohamed Harkat, Adil Charkaoui, Mohammad Mahjoub, Hassan Almrei, Mahmoud Jaballah. See Charkaoui v. Canada [2007] 1 S.C.R. 350 (Can.).

that the named persons are inadmissible to Canada on the ground that their presence is reasonably believed to pose a threat to national security by virtue of their terrorism-related activities.⁶⁰ As lawyers are prone to do, the Supreme Court of Canada has relied heavily on procedural protections as the principal means of mediating the conflicting demands of public safety and individual rights, but has been more nuanced on the substantive aspects of indefinite detention of non-citizens.⁶¹

The reason for the prolonged detention of the five named individuals in question was that they are nationals of countries where they fear they will be tortured or otherwise persecuted if they are returned there. The Supreme Court of Canada has held that, save in exceptional (but unspecified) circumstances, it is a violation of the constitutional right not to be deprived of security of the person other than in accordance with the principles of fundamental justice for the state to remove a person to a country where he or she would face a substantial risk of torture.⁶² Thus, while non-citizens are formally being detained pending their deportation on national security grounds, the link between detention and removal has become increasingly attenuated over time, so that, in the words of one commentator, their detention resembles "a preventive detention regime rather than detention for the purpose facilitating removal."⁶³ Successful criminal prosecution in Canada is generally regarded as an impracticable alternative.

The Government has relied largely on highly sensitive intelligence information to support the reasonableness of its belief that detainees have been involved in terrorist activities and pose a continuing threat to Canada's security. To disclose such information to detainees or their lawyers for the purpose of challenging the reasonableness of the security certificate or detention could potentially endanger the lives of informants, jeopardise the continued flow of valuable information to national security officials, and otherwise disrupt the Government's intelligence-gathering activities.

60. Immigration and Refugee Protection Act, S.C. 2001, c. 27, § 77(1). See David Dunbar & Scott Nesbitt, *Parliament's Response to Charkaoui: Bill C-3 and the Special Advocate Regime under IRPA*, 42 SUP. CT. L. REV. (2d) 435 (2008) for a clear account of the security certification system and the post-*Charkaoui* reforms.

61. See, e.g., Rayner Thwaites, *Process and Substance: Charkaoui I in the Light of Subsequent Development*, 62 U.N.B. L.J. 13, 14, 17 (2011).

62. *Suresh v. Canada*, [2002] 1 S.C.R. 3, para. 129 (Can.).

63. Thwaites, *supra* note 61, at 15.

In recognition of this problem, the legislation provided that a summary of the Government's case should be provided to detainees so that they can attempt to answer the case against them at periodic hearings held before a Federal Court Judge to review the reasonableness of the security certificate and the continued detention.⁶⁴ However, the Government may request a hearing from which the detainee and his lawyer are excluded, in order to present to the Judge evidence in support of the certificate or detention, the disclosure of which would endanger national security.⁶⁵ Prior to legislative changes that came into effect in 2008, it fell to the Judge, aided only by Government lawyers, to play an active role in the "secret" proceeding by critically examining and assessing the adequacy of the documentary evidence, and by probing the oral testimony of security officials. That the Judge, unlike a commissioner conducting a public inquiry, lacks an independent power to gather evidence inevitably limited the efficacy of the review process.

While upholding the constitutionality of most of the statutory detention scheme, the Supreme Court held in 2007 that the procedural arrangements did not satisfy the principles of fundamental justice because they did not provide an adequate opportunity for detainees to know and answer the case against them.⁶⁶ In its reasons for decision, the Court acknowledged that the principles of fundamental justice do not necessarily require full disclosure of security-sensitive information.⁶⁷ It suggested several options, including a system of "special advocates" such as that adopted in the United Kingdom, which would achieve a more appropriate balance between individual rights and national security.⁶⁸ The Court suspended the declaration of invalidity for a year to enable Parliament to rework the impugned statutory provisions.⁶⁹

Parliament responded promptly to this "invitation" by amending the legislation to take up one of the Court's suggestions: special advocates.⁷⁰ The amendments required the Judge reviewing the continued detention of an individual to appoint a special advocate from a list of security-cleared, private sector lawyers to play the

64. Immigration and Refugee Protection Act, S.C. 2001, § 77(2) (Can.).

65. *Id.* § 83(1)(c).

66. *Charkaoui v. Canada*, [2007] 1 S.C.R. 350 (Can.).

67. *Id.* at para. 24.

68. *Id.* at paras. 57, 70-84.

69. *Id.* at para. 140.

70. Immigration and Refugee Protection Act, S.C. 2001, §§ 85.1(2), 85.2 (Can.).

role at the non-public phase of the hearing that in other contexts would be played by counsel for the detained person: to challenge the view of the Government on the scope of non-disclosure to the detainee; to indicate weaknesses, limitations, gaps, and inconsistencies in the confidential documentary evidence on which the Government relied; to, in effect, cross-examine the witnesses (typically members of Canada's intelligence service) called by the Government to testify at the non-public phase of the hearing; and to make submissions in support of the detainee.⁷¹

To enable special advocates to perform their task, the Government must disclose to them, on the basis of strict confidentiality, all the material that is presented to the Judge but withheld from the person concerned and his lawyer.⁷² The Minister of Justice is obliged to ensure that special advocates have adequate administrative support and resources.⁷³

The role of the special advocate is to protect the interests of the detained person in the closed phase of the Judge's periodic review of the reasonableness of the security certificate and the detention or the conditions on which the person has been released.⁷⁴ However, special advocates are not in a lawyer-client relationship with the detainee, although communications between them are expressly deemed by the statute to be covered by solicitor-client privilege.⁷⁵ Once appointed, the special advocate receives a copy of the summary of the confidential information provided to the detained person, with whom the advocate may meet to discuss the case.⁷⁶ However, after the Government has fully disclosed the confidential information to the special advocate, communication with the detainee is permitted only with leave of the Judge.⁷⁷ This limitation no doubt imposes a significant fetter on a special advocate's effectiveness.

The constitutionality of this scheme has been upheld by the Federal Court of Appeal.⁷⁸ Given the security interest in protecting the identity of informants, our Court held that the statute provides a proxy for full disclosure that is sufficient to ensure that

71. *Id.*

72. *Id.* § 85.4.

73. *Id.* § 85(3).

74. *Id.* § 85.1(1).

75. *Id.* § 85.1(3)-(4).

76. *Id.* § 85.4(1).

77. *Id.* § 85.4(2)(3).

78. *Harkat v. Minister of Citizenship and Immigration*, [2012] 3 F.C.R. 635, paras. 156-57 (Can.) (leave to appeal to the Supreme Court of Canada has been requested).

a detainee is not being deprived of his liberty in breach of the principles of fundamental justice.⁷⁹

It is widely believed that the special advocate procedure has significantly improved the efficacy of the reasonableness review process. Two of the five detainees were released in 2009 following the quashing of the security certificates under which they were held, while the other three have been conditionally released.⁸⁰ The ongoing review proceedings have focussed on the scope of disclosure to the persons concerned and the destruction of important evidence by the security service. How much detainees know of the case against them is critical to their ability to instruct their special advocate at the initial meetings.

B. Coming Home: Canadian Citizens Abroad

I turn now to two cases of Canadian citizens who invoked the Charter in an attempt to return home. Although both arose out of the heightened post-9/11 national security concerns, the courts found the Government to have violated the Charter rights of the individuals concerned.

The first case concerns a Canadian citizen, Omar Khadr.⁸¹ He had been captured in Afghanistan in 2002 by U.S. forces following a gun battle in which an American serviceman was killed by a grenade, which, U.S. authorities alleged, Khadr had thrown.⁸² He was fifteen years old at the time and appears to have been “recruited” into Taliban activities by his father.⁸³ Following his capture, Khadr was incarcerated at Guantanamo Bay where, among other things, he was charged with war crimes, and subjected to a sleep deprivation program to make him more compliant during interrogation.⁸⁴ With knowledge of this mistreatment, and without affording him access to counsel, Canadian officials questioned Khadr in 2003 and 2004 about matters pertaining to the charges against him.⁸⁵ They then shared tapes of the interviews with U.S. authorities.⁸⁶ The Canadian Government refused Khadr’s re-

79. *Id.* at para. 85.

80. For further discussion on exiting the certificate system for *Charkaoui* and *Almrei*, see Thwaites, *supra* note 61, at 23-29.

81. *Canada (Justice) v. Khadr (Khadr I)*, [2008] 2 S.C.R. 125.

82. *Id.* at para. 5.

83. *Id.*

84. *Canada (Prime Minister) v. Khadr (Khadr II)*, [2010] 1 S.C.R. 44, para. 5.

85. *Id.*

86. *Id.*

peated requests that it ask the United States to return him to Canada.⁸⁷ Other Western countries had successfully requested the return of their nationals from Guantanamo.

Khadr's legal challenge to the Government's refusal to request his return raised two issues for the Supreme Court: first, had the conduct of Canadian officials breached his rights under the Charter and, second, if it had, what was the appropriate remedy?⁸⁸ On the first issue, the Court noted that customary international law and comity normally preclude Canadian citizens from relying on the Charter to protect them from the conduct of Canadian officials abroad.⁸⁹ However, it held that this case was exceptional; the Charter applied extraterritorially because the military commission regime applicable to Guantanamo detainees in 2003 and 2004 violated fundamental human rights protected by international law.⁹⁰

The Court went on to find that, while Canada was not primarily responsible for Khadr's loss of liberty, it had participated in the illegal regime through its officials' conduct, and had contributed to the continued deprivation of his liberty by sharing the information obtained from him with their U.S. counterparts.⁹¹ Moreover, the Court said, the circumstances of Khadr's interrogation by Canadian officials so "offends the most basic Canadian standards about the treatment of youth suspects" as to constitute a breach of the principles of fundamental justice.⁹²

However, the Supreme Court did not agree with the lower courts that the appropriate remedy for this Charter breach was to order the Government to request the United States to return Khadr to Canada.⁹³ While acknowledging that the conduct of foreign relations is not a Charter-free zone, the Court stated that courts should be very reluctant to insert themselves into the Executive's exercise of its broad discretion in dealing with other states by ordering it to make representations to a foreign government.⁹⁴ Moreover, the evolving nature of the situation, and the absence from the record of the complete range of options being

87. *Id.* at para. 6.

88. *Id.* at para. 11.

89. *Khadr I*, [2008] 2 S.C.R. 125, paras. 16-17 (Can.); *see also* R. v. Hape, [2007] 2 S.C.R. 292, para. 48 (Can.).

90. *Khadr II*, 1 S.C.R. 44 at para. 18 (citing *Khadr I*, 2 S.C.R. 125 at paras. 16-17).

91. *Id.* at para. 21.

92. *Id.* at para. 25.

93. *Id.* at para. 38.

94. *Id.* at paras. 39-40.

considered by the Government, made it inappropriate to require the Government at that point to make the representations requested.⁹⁵ In the event, the Court simply declared that Khadr's Charter rights had been violated and left it to the Government to consider what action to take to remedy the breach⁹⁶—another example of the Court's fondness for constitutional "dialogue" with the other branches of government.

Having brought you so far in the story, I should not leave you in suspense! In response to the Supreme Court's invitation, the Government reaffirmed its decision not to request Khadr's repatriation, but requested U.S. authorities not to use the tapes of the interrogations in the criminal proceedings,⁹⁷ a request that they promptly rejected. Khadr challenged the legal adequacy of the Canadian Government's decision in the Federal Court.

After concluding that the Supreme Court had ordered the Government to fashion a remedy for the Charter breach, the Judge declared that the Government had acted procedurally unfairly by deciding on a remedy without affording Khadr an opportunity to make submissions.⁹⁸ The Judge added that, while a request by the Government for Khadr's return to Canada seemed the only potential remedy for the violation of his Charter rights that had not yet been tried, he had decided to give the parties time to explore other possibilities until a remedy was found that truly cured the Charter breach.⁹⁹

Any appeal from this decision became moot when, in 2010, pursuant to a plea bargain, Khadr pleaded guilty before the military commission to murdering the U.S. soldier and was convicted and sentenced.¹⁰⁰ In an application for judicial review to the Federal Court filed earlier this year, Khadr alleged that the Canadian Government's delay in dealing with his transfer request was unreasonable and an abuse of process.¹⁰¹ However, this litigation, too, is now moot: Omar Khadr was returned to Canada at the end

95. *Id.* at para. 44.

96. *Id.* at para. 47.

97. *Khadr v. Canada (Prime Minister)*, [2010] 4 FCR 36 para. 85.

98. *Id.* at para 75.

99. *Id.* at para 95.

100. *Khadr v. Canada (Prime Minister)*, 2011 F.C.A. 92, para. 1.

101. Siobhan McClelland, *Khadr's Lawyers No Strangers to Int'l Cases*, LAW TIMES (Aug. 20, 2012), <http://www.lawtimesnews.com/201208209270/Headline-News/Khadrs-lawyers-no-strangers-to-intl-cases>.

of September of this year to serve out the remainder of his sentence.¹⁰²

My second story of a Canadian citizen whose return to Canada was blocked by the Government, concerns Mr. Abdelrazik, Sudanese by origin and still a citizen of Sudan.¹⁰³ He was recognized as a refugee in Canada in 1992 and granted permanent residence status.¹⁰⁴ Abdelrazik seems to have come to the attention of the Canadian intelligence service because he was an acquaintance of a man convicted in the United States of plotting to blow up an airport, and of a person detained in Canada under a security certificate.¹⁰⁵ He was never charged with a criminal offence in Canada.¹⁰⁶

On his return to Sudan to visit his sick mother in 2003, Abdelrazik was arrested and detained by Sudanese authorities.¹⁰⁷ While in detention there, his Canadian passport expired.¹⁰⁸ On his release, he was designated by the U.S. State Department as a person posing a significant risk of committing acts of terrorism.¹⁰⁹ He was also listed by a committee of the United Nations Security Council as an associate of Al-Qaeda, and thereby became subject to a travel ban.¹¹⁰ His name had previously appeared on several "no-fly" lists.¹¹¹

Fearing further detention by Sudanese authorities, Abdelrazik was granted refuge in the Canadian Embassy in Khartoum.¹¹² He made numerous unsuccessful requests to the Canadian Government to issue him with a passport or other travel documentation, and otherwise to facilitate his return to Canada.¹¹³ Having got nowhere with these requests, he made an application for judicial review to the Federal Court alleging that the Government's con-

102. Michelle Shephard & Tonda MacCharles, *Omar Khadr back in Canada*, THE TORONTO STAR (Sept. 29, 2012), <http://www.thestar.com/specialsections/omarkhadr/article/1264339--omar-khadr-repatriated-to-canada>.

103. *Abdelrazik v. Canada* (Minister of Foreign Affairs), [2010] 2009 F.C.R. 580, para 10.

104. *Id.*

105. *Id.* at para. 11.

106. *Id.*

107. *Id.*

108. *Id.* at paras. 12-14.

109. *Id.* at para. 22.

110. *Id.* at para. 23.

111. *Id.* at para. 11.

112. *Id.* at para. 30.

113. *Id.* at paras. 30-33.

duct effectively denied him his Charter right, as a Canadian citizen, to enter Canada.¹¹⁴

The Court held that the constitutional right of Canadian citizens abroad to enter Canada implicitly obliges the Government to issue an emergency passport to enable those who meet the passport eligibility criteria to travel to and enter Canada.¹¹⁵ It is irrelevant that passports are issued through an exercise of a Crown prerogative, rather than statute. While the administrative criteria governing the issue and revocation of passports authorize the Minister of Foreign Affairs to refuse a passport on national security grounds, the Court held that this did not justify the Charter breach in this case.¹¹⁶ Abdelrazik had not been given prior notice of, and an opportunity to respond to, the allegations, as the criteria required, and the Government had offered no evidence to support the view that he was a threat to national security.¹¹⁷

As for the travel ban imposed by the U.N. committee, the Court concluded that, properly interpreted, it did not require states to prevent a "banned" person from travelling through their airspace or airports while in transit to their country of nationality.¹¹⁸ It therefore did not justify governmental conduct to thwart Abdelrazik's return to Canada.¹¹⁹ However, because he could face difficulties *en route* from Khartoum to Toronto, the Government was under a duty to provide an escort from Foreign Affairs to accompany him.¹²⁰

The Government did not appeal this decision and Abdelrazik came home. This case clearly illustrates that, given the right facts, courts are prepared to vindicate individuals' Charter rights, and will not be deterred by a blanket invocation of national security, Crown prerogative, broad discretion, and international relations.

V. THE DUTY TO CONSULT

Section 35 of the *Constitution Act, 1982* recognizes and affirms existing Aboriginal rights and treaty rights of the Aboriginal peoples of Canada, who are defined as including Indian, Métis and

114. *Id.* at para. 42.

115. *Id.* at para. 152.

116. *Id.*

117. *Id.* at para. 153.

118. *Id.* at para. 126.

119. *Id.* at para. 129.

120. *Id.* at para. 166.

Inuit peoples of Canada.¹²¹ This addition to the Constitution has provided a legal basis on which to build a process of reconciliation between the descendants of the Aboriginal people who occupied the land prior to the arrival of European settlers, and the reality of Crown sovereignty.¹²²

Conflicts in some parts of Canada between the new settlers and Aboriginal people were resolved by treaties between groups of Aboriginal people and the Crown. Under these treaties, Aboriginal peoples typically surrendered to the Crown the lands that they had occupied, and from which they derived their sustenance, in return for lands reserved for them and for other benefits. In the absence of a treaty extinguishing rights to land traditionally occupied by Aboriginal peoples and to the resources of that land, they retained an interest in the land and the right to exploit its resources, including the mining of minerals, fishing and hunting. The Crown proclaimed itself to be protector of Aboriginal peoples and is regarded by the courts as standing in a fiduciary-like relationship to them. The honour of the Crown requires it to deal with Aboriginal peoples in a manner consistent with this relationship.¹²³

When the parties are unable to resolve claims to Aboriginal title, resource rights or treaty rights, it may be necessary to resort to litigation. The gathering of historical evidence and oral history necessary to support the disputed claims, not to mention the trial itself, can be very protracted indeed.¹²⁴ Meanwhile, the claims may be jeopardised by activities that could adversely affect the lands or other rights that are the subject of the claims.

It would, of course, be possible for claimants to seek an interlocutory injunction to restrain such conduct pending the outcome of the litigation. However, the Supreme Court of Canada has pointed out that this is a far from perfect remedy, especially given the length of time that it can take to establish a disputed Aborigi-

121. Rights of the Aboriginal Peoples of Canada, § 35, Part II of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.).

122. *R v. Van der Peet*, [1996] 2 S.C.R. 507, para. 31 (Can.).

123. The general principle that the Crown stands in a fiduciary-like relationship with Canada's Aboriginal peoples was first developed by the Supreme Court of Canada in *Guerin v. The Queen*, [1984] 2 S.C.R. 335 (Can.). The principle was expanded in *R v. Sparrow*, [1990] 1 S.C.R. 1075 (Can.). For further discussion on the development of this principle see J. TIMOTHY S. MCCABE, *THE HONOUR OF THE CROWN AND ITS FIDUCIARY DUTIES TO ABORIGINAL PEOPLES* (2008).

124. See generally *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (Can.) (Aboriginal title); *Van der Peet*, 2 S.C.R. 507 (Aboriginal rights). Supreme Court discussion on the practical difficulties relating to evidence in aboriginal rights and treaty claims.

nal right and the adversarial nature of the process.¹²⁵ It stated that a negotiated resolution was preferable and, with this in mind, created a duty in the Crown to consult with Aboriginal people before taking any action that could adversely affect their potential rights and, in some circumstances, to accommodate Aboriginal interests.¹²⁶ This constitutional duty, now part of the rights protected by section 35, is grounded in the honour of the Crown.¹²⁷ It is designed to further the process of reconciliation of prior Aboriginal occupation of the land and Crown sovereignty.¹²⁸

The duty to consult arises when the Crown has actual or constructive knowledge of the potential existence of an Aboriginal right and is contemplating conduct that may adversely affect it.¹²⁹ The duty is triggered fairly easily. However, its content is highly variable, ranging on a procedural spectrum from, at the low end, a simple requirement to give notice of the contemplated action and to listen to Aboriginal concerns, to, at the high end, a duty to accommodate the Aboriginal interests.¹³⁰ The most important factors determining the content of the duty are the strength of the claim, and the likelihood and seriousness of the damage that may be caused to the subject of the claim by the proposed action.¹³¹ Regulatory agencies may be authorized to discharge the Crown's duty to consult in the context of an environmental assessment or some other administrative review of the governmental decision in question.¹³²

125. *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 14 (Can.).

126. *Id.* at para. 15; see also *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 (Can.) (heard concurrently with *Haida Nation*); *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, paras. 33-34 (Can.) (the Supreme Court extended the duty to consult to the context of treaty implementation).

127. Rights of the Aboriginal Peoples of Canada, s. 35, Part II of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.).

128. *Haida Nation*, 3 S.C.R. 511, paras. 16-17; *Van der Peet*, 2 S.C.R. 507, para. 31. In 2010, the Supreme Court released a trilogy of cases on the duty to consult that confirmed the principles of reconciliation and the honour of the Crown as guiding Crown-Aboriginal relations in Canada: *Quebec (Att'y Gen.) v. Moses*, [2010] 1 S.C.R. 557 (Can.); *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650, para. 32 (Can.); *Beckman v. Little Salmon*, [2010] 3 S.C.R. 103, para. 10 (Can.).

129. *Haida Nation*, 3 S.C.R. 511, para. 35.

130. *Id.* at paras. 43-44.

131. *Id.* at para. 45. See also Zena Charowsky, *The Aboriginal Law Duty to Consult: An introduction for Administrative Tribunals*, 74 SASK. L. REV. 213, 219 (2011) (discussing the scope and content of the duty to consult).

132. *Haida Nation*, 3 S.C.R. 511, at para. 53; *Rio Tinto*, 2 S.C.R. 650, paras. 55-58.

When the duty to consult includes a duty to accommodate, "the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests."¹³³ However, even at its most expansive, the duty to consult does not confer on Aboriginal claimants the right to veto any particular government action.¹³⁴

The duty to consult has recently attracted wider public attention than usual. The federal Government has strongly supported the construction of a pipeline to carry oil from the Alberta oil sands to a port on British Columbia's coast for shipping to Asian markets. The project appears to be deeply unpopular in British Columbia because the Province will bear the environmental risks of any oil spills from the pipeline itself or from tankers transporting it by sea, without receiving much by way of offsetting benefits.

The pipeline is planned to cross lands that are subject to Aboriginal claims to lands and resources; until quite recently, treaties had not been concluded in British Columbia to settle these claims. It has been suggested that the federal Government has been insufficiently attentive to its duty to consult and that, without extensive consultation and possible accommodation of Aboriginal interests, the whole project may become mired in litigation, with an inevitably uncertain outcome.¹³⁵

VI. CONCLUSIONS

I did not select the current constitutional issues that I have included in this paper with any particular theme in mind. Nonetheless, some of the cases illustrate the Supreme Court's commitment to balance and process in the constitutional resolution of difficult public policy issues involving competing interests. A willingness to negotiate differences and to search for an acceptable common ground is an essential component of the Canadian DNA.

Thus, the Court struck down the comprehensive scheme for a national securities regulator on the ground that it threatened the balance between the provinces' jurisdiction over property and civil rights, and the federal jurisdiction over trade and commerce. The

133. *Haida Nation*, 3 S.C.R. 511, para. 50.

134. *Id.* at para 48.

135. Shawn McCarthy & Nathan Vanderklippe, *Crucial Pipelines Jeopardized by Failure to Consult First Nations*, *Prentice Warns*, THE GLOBE AND MAIL (Sept. 27, 2012), <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/crucial-pipelines-jeopardized-by-failure-to-consult-first-nations-prentice-warns/article4572255/>.

Court noted that federal-provincial cooperation might produce a scheme that better respected the foundational principles of Confederation. The Court also saw good faith constitutional negotiation as the appropriate response to a vote for the secession of a province by a clear majority on a clear question. The duty to consult before decisions are made that may adversely affect potential Aboriginal rights also purports to enable a proper balance to be struck between the interests of Aboriginal peoples and the Crown. The Court has sought to balance the right to liberty of the person and the protection of national security by enhancing the procedural rights afforded to detainees through the provision of special advocates.

There are, in my view, many less satisfactory ways of addressing complex contemporary constitutional problems.